

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

VATTEROTT EDUCATIONAL CENTERS, INC.

Employer

and

Case 14-RC-12738

UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING & PIPE FITTING
INDUSTRY OF THE UNITED STATES AND CANADA,
AFL-CIO, LOCAL UNION NO. 562

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTIONS**

The Employer, Vatterott Educational Centers, Inc., is a career college. The Petitioner, United Association of Journeymen & Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local Union No. 562, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent all full-time, adjunct, and part-time instructors employed at the Employer's NorthPark Campus in Berkeley, Missouri.¹ A hearing officer of the Board held a hearing, and the parties filed briefs with me, which I have carefully considered.

As evidenced at the hearing and in the briefs, the parties disagree on two issues. First, the Employer contends that the Petitioner is a business rival of the Employer and is disqualified from representing the petitioned-for employees. Second, the Employer argues that the adjunct and part-time instructors are not appropriately included in a unit of full-time instructors. The Petitioner contends that it is not a business rival of the Employer. The Petitioner argues that the apprenticeship fund, that the Employer bases its argument on, is a sufficiently unrelated entity

¹ The Petitioner amended the petitioned-for unit at hearing.

and not under the control of the Petitioner, and, even if it is sufficiently under the Petitioner's control, the apprenticeship fund does not compete with the Employer. The Petitioner also maintains that all instructors, including full-time, part-time, and adjunct, are appropriately included in the unit. In the alternative, the Petitioner seeks a unit of all full-time instructors and a unit of all adjunct and part-time instructors, which the Employer did not oppose at hearing. However, on brief, the Employer maintains that the adjunct instructors are temporary employees and ineligible to vote. As discussed more fully below, I find that the Petitioner is qualified to act as the bargaining representative of the Employer's employees and that a unit of all full-time instructors and a separate unit of all adjunct and part-time instructors are appropriate.

I. BACKGROUND

A. The Employer's Operations

The Employer operates a private, for-profit career college with facilities located in various cities and states. The only facility involved is the Employer's NorthPark Campus located in Berkeley, Missouri, here called NorthPark. The Employer is accredited by the Accrediting Commission of Career Schools and Colleges of Technology, which is listed by the U.S. Department of Education as a nationally recognized accrediting agency. The Employer is certified to operate by the Coordinating Board for Higher Education, State of Missouri. The Employer holds meetings with employers in the industries covered by its program offerings to make sure its teachings are current with industry standards.

Tom Lockett is the Director of Education and oversees the program directors and instructors, the registrars, and the career services department. There are eight program directors² who report to Tom Lockett. The program directors, in turn, supervise the instructors in their respective programs. There are approximately 23 full-time instructors, 21 adjunct

² The parties stipulated that the program directors are supervisors within the meaning of Section 2(11) of the Act.

instructors,³ and 3 part-time instructors.⁴ Instructors must have at least 3 years work experience in the field to teach a diploma course, 4 years work experience to teach an associate degree course, and at least a bachelor degree to teach a bachelor degree course. None of the instructors have a teaching certificate from the State of Missouri.

NorthPark offers diplomas in combination welding; computer technology; cosmetology; dental assistant; electrical mechanics; heating, air conditioning, and refrigeration, also referred to as HVAC; medical office assistant; and plumbing. The diploma programs, with the exception of cosmetology, consist of 60 weeks and 72 quarter credit hours of classroom theory and associated lab work, and train students for entry level employment. One quarter credit hour is earned for each 10 hours of classroom lecture and each 20 hours of lab work.⁵ NorthPark offers an Associate of Occupational Studies, A.O.S., in combination welding technology; computer systems and network technology; electrical mechanics technology; heating, air conditioning, and refrigeration technology; medical assistant; medical billing and coding; plumbing technology; and web design and multimedia application development. The associate programs consist of 90 weeks, 94.5 quarter credit hours of theory and associated lab work, and 13.5 quarter credit hours of general education for a total of 108 quarter credit hours. The credit hours earned in a diploma program are applied to the associate program in the same career field. Finally, NorthPark offers a Bachelor of Science, B.S., in Computer Programming and Systems Analysis and Computer Engineering and Network Technology, both of which programs consist of 170 weeks and a total of 213 quarter credit hours.

There are approximately 876 students presently enrolled at NorthPark. There are approximately 50 to 70 students enrolled in the plumbing program; 125 in welding; 170 in

³ One of the adjunct instructors was previously a full-time instructor.

⁴ A witness for the Petitioner stated that two of the instructors that the Employer listed as part-time instructors are adjunct instructors.

⁵ Quarter credit hours multiplied by two thirds equals the equivalent of semester hours.

heating, air conditioning, and refrigeration; 100 in electrical mechanics; 130 in cosmetology; 140 in medical; 12 in dental; and about 25 in computer technology.

Admission to the Employer is open to the general public. The admission policy requires that the applicant have a high school diploma or a general education diploma (GED). The applicant must also complete an application for admission, an enrollment agreement, request a high school or GED transcript, fill out financial aid forms if applicable,⁶ and pay a registration fee. Students pay their own tuition upon enrollment or pay pursuant to a tuition financing proposal.⁷ Although some students may receive tuition reimbursement from a company they work for, the Employer's witness could only recall one example of such a situation. The Employer will evaluate the student's previous education, training, and work experience to determine if any subjects or training activities in the student's program may be waived and thereby reduce the amount of education or training required for the student to reach the educational objective. The Employer also has grade point average (GPA) and attendance requirements for its students. Career Services provides a graduate placement process that includes the writing of resumes and the interview process, but the Campus Catalog states that "Employment and internship/externship decisions are outside of the control of the [Employer]." The Employer has articulation agreements with Phoenix University and Webster University, which accept credit for course work completed at NorthPark.

The Employer uses various marketing methods to attract students, including television, newspapers, and radio, and sets up information booths at high schools and career fairs. The Employer partners with governmental agencies in its recruiting efforts, including Vocational Rehabilitation, Worker Investment, and the Department of Veterans' Affairs, which has

⁶ Students are eligible for various grants, loans, and scholarships.

⁷ On brief, the Petitioner states that tuition ranges from \$21,000 to \$62,000 not including fees and cites Employer Exhibit 7, the Campus Catalog, page 96. While the Table of Contents of the Campus Catalog lists Appendix E – Tuition and Fees, Appendix E has been removed from the Campus Catalog that the Employer offered and was received in evidence.

approved the Employer's program so that students can take advantage of their veterans' benefits to go to school. The Employer also has an Imagine America Military Award Program that was established by the Career College Foundation to help military personnel pursue their post-secondary career education.

Courses begin every 10 weeks, referred to as phases. New students start every 10 weeks. Classes, which are divided between classroom theory and associated lab work, are held from 8 a.m. to 12:30 p.m., Monday through Thursday, and from 6 p.m. to 10:30 p.m., Monday through Thursday, for all programs except welding and cosmetology. In addition to the morning and evening classes, welding has a 1 p.m. to 5:30 p.m. class, Monday through Thursday. The cosmetology day program is from 8 a.m. to 2:30 p.m., Monday through Friday, and the evening program runs from 5:30 p.m. to 10:30 p.m., Monday through Thursday and 8 a.m. to 1 p.m. on Saturday. A student typically attends either morning or evening classes. Welding students attend classes either in the morning, afternoon, or evening. The Employer also offers on-line courses.

Full-time instructors teach two classes a day, generally a morning and evening session. Adjunct instructors regularly teach one course, but presently about four to six of the adjunct instructors are teaching two classes a day. Part-time instructors work when other instructors are absent due to illness, vacation, or other reason, although one part-time instructor was working a full-time schedule as of the date of the hearing. The record is silent as to how many hours the other part-time instructors work.

The full-time instructors are salaried and their pay does not vary based on the hours they work, while the adjunct and part-time instructors are compensated at an hourly rate for the hours they work. One full-time instructor, who has been employed since 1999, testified that he is paid a salary that he estimates is \$20.19 per hour. The adjunct instructors' wages range from \$16 to \$25 per hour. The record is silent as to the wage rate paid to part-time instructors. Only the adjunct instructors sign an Adjunct Faculty Agreement that states they are not full-time

employees and, like the part-time instructors, are not eligible for employee benefits described in the employee handbook, including medical insurance, 401(k) retirement savings plan, sick leave, vacation, and holidays. The agreement further states the course the instructor will teach, the beginning and end dates, and the times and days of the week the course will be taught. The agreement also states that the agreement is only to teach the described course and “does not imply, and expressly denies and disclaims, an obligation or promise that the Instructor will teach additional courses or any other form of future employment.” One adjunct instructor, whose hire date is February 15, 2008, testified that while he signed an initial adjunct faculty agreement, he was not asked to sign another agreement until recently. An adjunct instructor terminated during the term of the agreement or contract is paid through the end of the contract. A full-time instructor who is terminated may get a severance, but ceases to be paid.

Full-time instructors are the only instructors listed as faculty in the NorthPark Campus Catalog. The full-time instructors have office cubicles that contain a storage area and place to hook up their laptop computers, which computers, the Employer only issues to full-time instructors, and have pass cards to enter the locked building and keys for their classroom. The adjunct and part-time instructors do not have their own offices, but rather have access to a shared work area that has computers and do not have keys to the building or classrooms. The program directors let the adjunct and part-time instructors into their classroom.⁸ Full-time instructors are required to attend faculty meetings and graduation ceremonies and do not receive any additional compensation for these duties. Meetings for adjunct and part-time instructors are usually optional, but when they are asked to attend meetings they receive their hourly wage rate, and they are not required to attend graduation.

⁸ Because they have pass keys to get into the locked south side of the building, full-time instructors park on the south side of the building. The adjunct and part-time instructors park on the north side of the building that does not require pass key access.

All instructors receive an instructor's handbook, which sets forth topics including instructor duties and responsibilities and procedures relating to students, and an employee handbook that covers attendance and punctuality, background investigations, business ethics, computer equipment policy, disciplinary actions, dress code, dispute resolution, substance abuse control policy, other policies and procedures, and work rules and standards that apply to all instructors, including, that as "at will" employees they can be terminated at any time. There is no tenure, and none of the instructors are given any guarantees of continued employment. In addition, full-time instructors, but not adjunct or part-time instructors, are subject to a policy prohibiting second jobs and other outside employment. This policy states that full-time instructors are expected to consider their position with the Employer as their primary employment, must notify the corporate human resources director if thinking of taking a second job, and are prohibited from having other employment that interferes with their job performance or poses a conflict of interest.

B. The Petitioner and the Apprenticeship Program

The Constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, here called the United Association or UA, provides:

All Local Unions of the United Association shall establish an apprentice system and related apprentice training that will afford apprentices a full and complete knowledge of the particular craft or trade covered by the jurisdiction of the Local Union. The Business Manager of the Local Union shall appoint a Committee on Apprentice Training whose duties shall be to establish an apprentice training program . . . and said program shall conform with the Federal Apprenticeship Standards as approved by the United Association.

The collective-bargaining agreement between the Petitioner and signatory employers provides for the continuation of the health and welfare trust fund known as "Plumbers and Pipefitters' Welfare Educational Fund," here called the Fund. The Board of Trustees for this Fund consists of 10 persons: 5 trustees designated by the Petitioner, referred to as union trustees; and 3 trustees designated by the Mechanical Contractors Association of Eastern

Missouri, Inc., and 2 trustees designated by the Plumbing Industry Council of St. Louis, collectively referred to as employer trustees. The union trustees include Mark Collom, a member of the Petitioner and its Examining Board. Collom was recommended by the Petitioner's business manager and approved by other trustees, including the Petitioner's executive director who is retiring and being replaced by the president and business representative; assistant business manager and vice president; and a business representative; together with at least four of the five employer trustees. All of the union trustees are members of the Petitioner and hold elected offices with the Petitioner.⁹

The Fund provides health, welfare, and training benefits, including an apprentice training program, to members of the Petitioner. The Fund is primarily financed by contributions made by signatory employers for each hour worked by employees covered by the collective-bargaining agreement. The Fund also earns income from investments. According to the Plumbers and Pipefitters Apprenticeship Standards, the Apprenticeship Program is registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training, and is administered by the Joint Apprenticeship Advisory and Training Committee (JATC), which consists of five committee members representing the Petitioner and five committee members representing Management, including plumbing and mechanical (pipefitting) contractors. In addition to Collom, two other trustees of the JATC are also members of the Petitioner and the Examining Board, whose members are elected every 3 years by the membership. A business representative is an appointed member of the JATC. An appointed member of the Petitioner's Examining Board, while not clear on the record, appears to be the fifth member of the JATC. The record identifies three management committee members but is silent as to the remaining two members.

Mark Collom, a trustee of the Fund and a JATC committee member, is employed by the Fund as the training director of the apprentice program, which he characterizes as being like a

⁹ The Form LM-2 that the Petitioner filed with the Department of Labor, Employment Standards Administration, lists overhead payments to the Fund and disbursements to officers.

principal in a school. He is also the apprentice program coordinator for the Petitioner. Training Director Collom's duties and responsibilities include supervising the instructors, coordinating apprentice activities, and making sure that the courses taught are relevant to industry needs, that the apprentices have the knowledge and skills to work for the mechanical and plumbing contractors by whom they are employed, and that the training school is efficient and productive. If the training director has problems, he consults with the Petitioner's Executive Board member, who is also a trustee of the Fund.

The training school, officially known as the Training Center, is located a couple of miles away from the Plumbers and Pipefitters Complex, which is located on 400 to 500 acres in North St. Louis County and houses the Petitioner's Union offices, the welfare offices, a health center, a retirement center, and a golf course. There are also satellite Training Centers in Cape Girardeau and Fulton, Missouri. These training schools are utilized by all of the Petitioner's members during their 5-year apprenticeship and by journeymen for continuing education including specializations. The Petitioner lists its training on its website, including the apprentice program and training centers. The United Association also lists the apprentice program on its website and has a link to UA University.

There are a total of about 35 full-time and part-time teachers employed by the Fund at the training school. The teachers attend and complete the United Association's 5-year Instructor Training Program which is now held at the UA University located on the campus of Washtenaw Community College in Ann Arbor, Michigan. Some teachers also hold specialty certificates. The full-time teachers are required to hold a Missouri teaching certificate. The part-time teachers are full-time employees of either mechanical or plumbing contractors who teach part-time in the evening. All teachers are members of the Petitioner and covered by a collective-bargaining agreement. Three of the teachers are officers of the Petitioner, two of whom are Examining Board members.

The apprentice program recruits apprentices based on employment needs and is a training benefit provided to the Petitioner's members only. There is only one class per year for plumbers and pipefitters apprentices. When the Petitioner has unemployed plumber and pipefitter apprentices, recruitment and admission to the apprentice program decline because participation in the program is linked to employment with employers who are signatory to a collective-bargaining agreement with the Petitioner. About 12 to 13 plumbers and 35 to 40 pipefitters are being accepted for the apprentice program this fall. Last year about 25 plumbers and 30 pipefitters were admitted to the program.

Applications for the plumber program are accepted the first 2 weeks of March each year and applications for the pipefitter program are taken the first 2 weeks of June each year. An applicant must have a high school diploma or the equivalent; must pass a math exam; must take a drug test and physical; and have a valid driver's license. If the applicant is seeking to be a service pipefitter, the applicant may also have a 2-year degree from an HVAC program and is evaluated by teachers and employers and given credit for his or her education based upon skill level. Thus, the apprentice program recruits individuals who have an associate degree from educational institutions such as the Employer,¹⁰ Ranken, Linn Tech, or other technical school, particularly for those who want to get into the HVAC industry. The training school and the apprenticeship program advertise in the St. Louis American for minority recruitment, and participate in Helmets to Hardhats, which is a national program where the building trades locals try to recruit veterans into the building trades. The training school and apprentice program may also participate in high school career days. Recruitment is limited due to many outstanding applicants. Admission to the apprentice program is determined by the JATC in consultation with instructors and union officers.

¹⁰ On about January 24, 2008, the Petitioner's assistant business manager and two business representatives met with representatives of the Employer to establish a relationship whereby students who completed the Employer's program could be accepted into the Petitioner's apprenticeship program.

Apprentices are dues-paying members of the Petitioner and full-time employees of mechanical or plumbing contractors.¹¹ Apprentices regularly attend the training school for 8 hours 1 day out of every 10 working days. The training school simulates work situations the apprentices are likely to encounter in the field that require them to use the skills and knowledge they need in the workplace. For example, the training facility has 38 welding booths¹² that simulate different pipe weld positions, such as pipe weld joints and weld assemblies on sharp pieces of pipe. The apprentices use textbooks and course manuals and take written examinations and performance tests. The other 9 days the apprentices work alongside journeymen plumbers and pipefitters on the job. The HVAC apprentices attend classes 1 day every week. In addition, all apprentices are obligated to attend 1 night class per week for 3 hours, for which they are not paid.

Upon acceptance into the apprentice program, the individual is required to complete 5 years of training, with each year consisting of up to 2,000 hours of on-the-job training and a minimum of 216 hours of classroom instruction. The apprentices do not pay tuition, rather the apprenticeship program is primarily funded by the contributions of employers who are signatory to a collective-bargaining agreement with the Petitioner. Their employers pay for the time the apprentices spend in class and on-the-job training, and the Fund pays for their books and training materials. About 98 percent of the apprentices become journeymen. After successfully completing the program, the individual becomes a journeyman and receives a journeyman plumber or journeyman pipefitter certificate from the Department of Labor. Apprentices can

¹¹ In October 2008, the Petitioner held a conference with construction, mechanical, and plumber contractors for the purpose of finding employment for its members. Included in the conference was a tour of the training center and viewing demonstrations, learning about the training curriculum, and discussing drug testing and safety programs, quality control and productivity, and diversity, as well as other contractor concerns and problems.

¹² The training center has replaced welding machines and modernized its equipment through United Association grants.

receive up to 32 college credits from Washtenaw Community College for completing the apprenticeship program.

II. ANALYSIS

I find that the Petitioner is not a business rival of the Employer under the Board's conflict of interest doctrine and is qualified to represent the Employer's employees. I further find that an election is appropriately directed in a unit of all full-time instructors and in a separate unit of all adjunct and part-time instructors.

A. The Petitioner is Not a Business Rival of the Employer

It is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized. In *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954), the Board enunciated its doctrine of disqualifying conflict of interest. In that case, in which the union was a direct business competitor of the employer, the Board's concern was that the union might take certain action to further its business interests rather than further the interests of the unit employees. Bausch & Lomb was engaged in the manufacture and sale of eyeglasses and optical products. The union established a company engaged in the same business. Only members of the union were stockholders of that company, and the union conceded that the union actually controlled and operated the company's business. The company operated by the union was in direct competition with the employer. The Board noted that in a collective-bargaining relationship, it is to the benefit of all the parties that the employer remains in business, but where the union is a competitor, it could derive a benefit by causing a strike or driving the employer out of business.

The conflict of interest doctrine is not limited to cases where a union and employer are in the same business; a union may also be disqualified when an enterprise controlled and dominated by the union engages in business with the employer. *Guardian Armored Assets, LLC*, 337 NLRB 556, 558 (2002), citing *St. John's Hospital & Health Center*, 264 NLRB 990

(1982). In order to find that a union has a disqualifying conflict of interest, the Board requires a showing of a “clear and present” danger of interfering with the bargaining process. *Alanis Airport Services*, 316 NLRB 1233 (1995). The burden to prove a conflict of interest is on the employer and it is a heavy one because of the strong public policy favoring the free choice of a bargaining agent by employees. *Garrison Nursing Home*, 293 NLRB 122 (1989), citing *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), *enfd.* 783 F.2d 1444 (9th Cir. 1986). Here, the Employer has not met its heavy burden to show that the Petitioner’s representation would pose such a clear and present danger sufficient to justify limiting employees’ statutory right of free choice.

In this case, the Petitioner does not deny that it is affiliated with the Fund and the apprentice program, which program is admittedly a benefit provided to members of the Petitioner. The Petitioner’s officers are trustees of the Fund and members of the JATC. The Petitioner, however, does not finance or receive financial benefits from these employee welfare benefits, which are funded by contributions from employers signatory to a collective-bargaining agreement. I find that the Petitioner and apprentice program are affiliated and the Petitioner’s activities are not segregated from the apprentice program, rather the Petitioner’s representational duties and the apprentice program are intermingled so as to conclude that the Petitioner exercises control over the apprentice program. *St. John’s Hospital & Health Center*, *supra*; *Visiting Nurses Association, Inc.*, 254 NLRB 49 (1981).

Even though the Petitioner arguably controls or dominates the Fund and its apprentice program, that program does not compete with the Employer so as to disqualify the Petitioner as a bargaining representative. The Employer has eight programs, which it offers to the general public, and those students that are admitted pay tuition. While the Employer has a career services program that will assist students in obtaining employment, it does not guarantee that the student will obtain employment. The diploma and associate programs are 60 and 90 weeks long, respectively, and the Employer offers two 170-week bachelor programs in the computer field. The students divide their time between classroom theory and lab work. Programs are not

limited in size and graduates of the diploma program are prepared for entry-level employment in their career field. In fact, graduates of the Employer's associate HVAC program may test into the Petitioner's apprentice program and be given credit toward the apprentice program.

In contrast, the Petitioner's apprentice program has plumber and pipefitter apprentices, which overlaps with only three of the Employer's eight programs – combination welding; heating, air conditioning and refrigeration mechanic; and plumbing. The apprentice program is a benefit to the Petitioner's members who are employed by signatory employers, which employers are the primary funders of the program. Further, the apprentice program operates in conjunction with employment by mechanical and plumbing contractors. Apprentices generally have 1 day of training school and 9 days of working alongside journeymen on the job every 2 weeks. The number of apprentices admitted to the program is limited to the number for whom the Petitioner has employment. The apprentice program is 5 years long and graduates of the program are certified as journeymen by the Department of Labor. The fact that both the Employer and the apprentice program may recruit from similar sources and have some similar courses does not establish that the Petitioner and its apprentice program have a disqualifying conflict of interest with the Employer. See *CMT, Inc.*, 333 NLRB 1307, 1310 (2001).

The Employer has failed to establish that the Petitioner has a "clear and present" danger of interfering with the bargaining process and will sacrifice the interests of represented employees for its own financial interests. The Employer has not established that the Petitioner would in any way alter its bargaining proposals to benefit its apprentice program. In fact, if the Petitioner were to cause a strike or drive the Employer out of business, that would not benefit either the Petitioner or its apprentice program, which has a waiting list of applicants and is limited by the small number of apprentices that it can admit to its apprentice program and place with signatory employers. The apprentice program is of no direct economic benefit to the Petitioner as an institution and the elimination of the program would not directly affect the Petitioner's financial interest.

The Employer contends that any student choosing to enter the apprentice program instead of the Employer's school is a direct benefit to the Petitioner in the form of dues, initiation fees, and increased employer contributions. The Board will not deprive employees of their right to select their collective-bargaining representative based on such speculation or conjecture. There is nothing in the record to suggest that employees educated by the Employer are any less likely to desire union representation and be willing to pay dues than the universe of employees in general. Again, employer contributions to the apprentice program are of no direct financial benefits to the Petitioner per se.

Accordingly, in these circumstances, I find that the Petitioner's representation of the Employer's employees does not constitute a "clear and present danger" to the collective bargaining process and no disqualifying conflict of interest exists based on the Petitioner's affiliation with the apprentice program. See *Guardian Armored Assets, LLC*, supra; *CMT, Inc.*, supra; *Alanis Airport Services, Inc.*, supra; *Associated Dry Goods Corp.*, 150 NLRB 812, 813 fn. 4 (1965) (Board declined to apply the *Bausch & Lomb* principle where it found that the alleged rival business was a cooperative store operated by the union for the use of the members only and could not be regarded as being in competition with the employer). If an actual conflict of interest should arise after the certification of the Petitioner, a party may raise that issue at that time through appropriate procedures under the Act. *CMT, Inc.*, supra at 1309 fn. 7; *Alanis Airport Services, Inc.*, supra at 1234.

B. The Appropriate Units

1. Unit of Full-Time Instructors and Unit of Adjunct and Part-Time Instructors is Appropriate

The Petitioner seeks to represent a unit of all full-time, adjunct, and part-time instructors employed by the Employer or, in the alternative, a unit of full-time instructors and a separate unit of all adjunct and part-time instructors. The Employer contends that the adjunct and part-time instructors do not share a community of interest with the full-time faculty and, therefore, should

not be included in the same bargaining unit. On brief, while the Employer acknowledges it stipulated to the appropriateness of a unit of part-time and adjunct faculty, it maintains the adjunct instructors are temporary employees and are ineligible to vote.

The full-time instructors are salaried employees who regularly teach two courses and the Employer is their primary employer. In fact, full-time faculty are required to seek permission to have a second job. The adjunct instructors generally teach one course and are required to sign an adjunct faculty agreement, although four to six adjunct instructors are teaching a full-time schedule, and there is evidence that at least one adjunct instructor has not signed an agreement for each course he has taught. The part-time instructors substitute for other instructors but the record does not establish how often they work. Fringe benefits, including medical insurance, vacation, and holidays are available to all full-time instructors. They are not available to adjunct and part-time instructors. The full-time instructors have offices, Employer-issued computers, and keys to the building and classrooms. The adjunct and part-time employees have access to a shared work area and computers, but do not possess building and classroom keys. The full-time instructors are required to attend meetings for which they receive no additional compensation. The adjunct instructors who attend meetings are paid their hourly wage rate.

In these circumstances, I conclude that the adjunct and part-time faculty do not share a community of interest with full-time faculty, and, therefore, I shall not include them in the bargaining unit with full-time instructors. *University of San Francisco*, 207 NLRB 12, 13 (1973); *Catholic University of America*, 205 NLRB 130 (1973); *New York University*, 205 NLRB 4, 8 (1973). See also, *Archdiocese of Philadelphia*, 227 NLRB 1178 (1977). Where, as here, the adjunct and part-time instructors share a community of interest with one another, they constitute a separate appropriate unit. *University of San Francisco*, 265 NLRB 1221 (1982).

2. The Temporary Status of Adjunct Instructors

The Employer contends, on brief, that its adjunct instructors are employed for a job of set duration pursuant to a 10-week contract, have no substantial expectancy of employment and have been notified of this fact, and are temporary employees who do not possess any expectation of continued employment.¹³ However, the fact that employees are hired for a specific course and phase does not warrant their exclusion as temporary employees where, as here, unusual employment patterns exist.¹⁴ Contrary to the Employer's assertion, its list of instructors demonstrates that at least 16 of the 24 adjunct and part-time instructors have been employed for a time period that encompasses more than one phase. So, despite the fact that they have been advised that they may not teach beyond the current phase, adjunct and part-time instructors have remained employed for multiple phases, have been retained beyond their original term of employment, and have a reasonable expectancy of further employment. *University of San Francisco*, supra at 1223. Accordingly, I conclude that adjunct instructors are not temporary employees.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

¹³ As noted, the Employer's employee handbook states that all instructors are "at will" employees and can be terminated at any time.

¹⁴ The cases cited by the Employer do not involve employers in education and are distinguishable. *Indiana Bottled Gas Co.*, 128 NLRB 1441 (1960) involved an employer engaged in the wholesale and retail distribution of liquid petroleum or propane gas. The Board excluded as temporary and casual employees those employees who were employed during the busy season – November through January or February – for periods of a week or two at a time and also as replacements for employees who were ill. In *Owens-Corning Fiberglass Corp.*, 140 NLRB 1323 (1963), the employer, who operated a warehouse, hired additional employees through the State employment service for as long as they were needed and, when their work was completed, discharged them with no promise of recall. Over a period of approximately 6 months, the employees hired worked on an average of less than 5 days, and, during 4 weeks of that time, no additional employees were required. In *Sealite, Inc.*, 125 NLRB 619 (1959), the employer, who was engaged in the manufacture and sale of textile materials utilized in the construction and maintenance of sewer pipe, hired construction site employees for one job only, and those employees had no substantial expectancy of continued employment. Eligibility to vote in construction industry elections is now determined by *Steiny and Co., Inc.*, 308 NLRB 1323, 1327 (1992) and *Daniel Construction Co.*, 133 NLRB 264 (1991), as modified at 167 NLRB 1078 (1967).

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹⁵

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

The Full-Time Instructors Unit

All full-time instructors employed by the Employer at its NorthPark, Berkeley, Missouri facility, EXCLUDING adjunct and part-time instructors, office clerical employees, guards, and supervisors as defined in the Act.

The Adjunct and Part-Time Instructors Unit

All adjunct and part-time instructors employed by the Employer at its NorthPark, Berkeley, Missouri facility, EXCLUDING full-time instructors, office clerical employees, guards, and supervisors as defined in the Act.

IV. DIRECTION OF ELECTIONS

The National Labor Relations Board will conduct secret ballot elections among the employees in the units found appropriate above. The employees in these units will vote on whether or not they wish to be represented for purposes of collective bargaining by United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Industry of the

¹⁵ At hearing, the Employer stated that the Petitioner's petition to revoke the Employer's subpoena was still outstanding. The hearing officer deferred ruling on the petition. The Employer did not raise this issue again, and the record closed without any ruling. Neither party has objected to the hearing officer's failure to rule, and there is no evidence that the parties were prejudiced by this conduct.

United States and Canada, AFL-CIO, Local Union No. 562. The date, time, and place of the elections will be specified in the Notice of Election that the Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the elections are those in the units who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names

and addresses of all the eligible voters in each unit. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). Upon receipt of the lists, I will make them available to all parties to the election.

To be timely filed, the lists must be received in the Regional Office, 1222 Spruce Street, Room 8.302, St. Louis, MO 63103, on or before **November 7, 2008**. No extension of time to file the lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file the lists. Failure to comply with this requirement will be grounds for setting aside the elections whenever proper objections are filed. The lists may be submitted by facsimile transmission at (314) 539-7794 or by electronic mail at Region14@nrlb.gov. Since the lists will be made available to all parties to the election, please furnish a total of **two** copies, unless the lists are submitted by facsimile or electronic mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 days prior to the date of the elections. Failure to follow the posting requirement may result in additional litigation if proper objections to the elections are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice. However, because there is no physical facility where employees report for work, the Regional Office will mail a Notice of Election to all eligible voters.

V. E-FILING

The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board website at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-file your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m. EST on **November 14, 2008**. This request may not be filed by facsimile.

Dated: October 31, 2008
at: Saint Louis, Missouri

/s/ Ralph R. Tremain
Ralph R. Tremain, Regional Director
National Labor Relations Board, Region 14